

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -3 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0355-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ANTHONY SHARIFF GAY,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20011542

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes

Tucson
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Anthony Gay petitions this court for review of the trial court’s order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Gay was convicted after a jury trial of first-degree murder and first-degree burglary. *State v. Gay*, 214 Ariz. 214, ¶ 1, 150 P.3d 787, 790 (App. 2007). His murder conviction was based on a theory of felony murder with burglary as the predicate crime. The trial court sentenced Gay to natural life imprisonment for murder and a concurrent, presumptive 10.5-year prison term for burglary, and we affirmed his convictions and sentences on appeal. *Id.*

¶3 Gay filed a notice and petition for post-conviction relief, raising six claims: (1) that *Snyder v. Louisiana*, 552 U.S. 472 (2008), constituted a significant change in the law “affect[ing] the outcome” of his claim raised on appeal pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), that the state had improperly used peremptory strikes to remove two black jurors from the panel; (2) that newly discovered evidence could have been used to impeach the fingerprint analyst that testified at his trial; (3) that his appellate counsel was ineffective for failing to argue that insufficient evidence supported his felony-murder conviction; (4) that appellate counsel also was ineffective in failing to argue the trial court had erred in excluding third-party culpability evidence, specifically, that semen samples from unknown donors were found in the victim’s home where she was killed; (5) that his trial counsel were ineffective in pursuing a third-party culpability defense because they did not adequately investigate the crime scene, did not fully

investigate evidence related to the possible culpability of a third party, P., and failed to impeach P.'s testimony with his previous conviction; and (6) that his trial counsel were ineffective in failing to object to the prosecutor's reference in closing argument to Gay's invocation of his right to counsel.

¶4 The trial court summarily dismissed Gay's newly discovered evidence claim and his claim that *Snyder* constituted a significant change in the law. It also summarily dismissed his claims of ineffective assistance of appellate counsel based on counsel's failure to argue sufficiency of the evidence on appeal and ineffective assistance of trial counsel based on counsels' failure to object to the prosecution's mention of Gay's request for counsel. It found his claim based on the exclusion of third-party culpability evidence to be precluded pursuant to Rule 32.2 because Gay had not raised that claim on appeal, apparently overlooking that Gay had argued in his petition that appellate counsel had been ineffective for failing to do so. The court denied Gay's remaining ineffective assistance of trial counsel claims after an evidentiary hearing.

¶5 On review, Gay abandons his newly discovered evidence claim and argues the trial court erred in rejecting his claims based on *Snyder* and his ineffective assistance of appellate and trial counsel claims. As to Gay's argument based on *Snyder* and his claims of ineffective assistance of trial counsel,¹ the court correctly rejected these claims

¹Gay's petition for review contains a section heading that reads "Failure to investigate." But the majority of his argument in that section does not discuss his trial counsels' purported failure to investigate evidence relating to his third-party culpability defense. Instead, his argument appears to assert the trial court had erred in excluding testimony related to his third-party culpability defense, a claim that, even if not precluded, *see* Ariz. R. Crim. P. 32.2(a), was not raised below. *See State v. Ramirez*, 126

in thorough and well-reasoned minute entries. No purpose would be served by restating the court's analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when court correctly identifies and rules on issues raised "in a fashion that will allow any court in the future to understand the resolution [, n]o useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision").

¶6 Gay asserts the trial court erred by rejecting his claim that appellate counsel had been ineffective for failing to argue the evidence of felony-murder was insufficient. He contends the jury's finding of burglary "must have been based on [his] intent to commit a theft, which was formed after the homicide." Thus, he reasons, because the murder therefore did not occur "in furtherance of" the burglary, burglary "could not provide the basis for a felony-murder conviction." *See* A.R.S. § 13-1105(A)(2) (person commits first degree murder by causing death of another "in the course of and in furtherance of" enumerated offenses). But Gay does not support his assertion that his intent to commit theft was formed only after the homicide had been committed; he provides no citation to the record or to the documents contained in the appendix to his petition for review. *See* Ariz. R. Crim. P. 32.9 (c)(1) (petition for review shall contain "specific references to the record" supporting claims). Nor did he provide references to supporting evidence in his petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.5 (record citations required in petition for post-conviction relief). Absent such support, he

Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review claims not raised below); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review must contain "issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review").

has failed to demonstrate his appellate counsel was ineffective in failing to raise this claim on appeal, and the court did not err in summarily dismissing this claim.² See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to prevail on ineffective assistance of counsel claim, defendant must show counsel’s performance deficient under prevailing professional norms and deficient performance prejudiced defense).

¶7 Gay contends his appellate counsel also was ineffective in failing to argue the trial court had erred in precluding evidence he asserts is relevant to his claim of third-party culpability—specifically, evidence that semen from unknown donors had been found in the victim’s home. Although we agree with Gay that the court erred in finding this claim precluded, he has not demonstrated he is entitled to relief. At trial, the court precluded the admission of that evidence in part because it pointed only generally to a third party or parties. See *State v. Dann*, 205 Ariz. 557, ¶¶ 30, 36, 7 P.3d 231, 242-43 (2003) (trial court has discretion to preclude evidence that raises “only a possible ground of suspicion against another” or “offer[s] mere suspicion or speculation regarding a class of persons”), quoting *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002).

²We observe that the trial court, in rejecting this claim below, misstated the required showing for felony-murder, stating “[t]here was substantial evidence the victim’s death occurred during the course of or in furtherance of the burglary,” rather than stating those requirements in the conjunctive as they are in § 13-1105(A)(2). But, we note that the jury was correctly instructed at trial that the victim’s death had to be caused “in the course of and in furtherance of” the burglary. We presume the jury followed those instructions. See *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). In light of Gay’s failure to support his sufficiency of the evidence argument with reference to the facts of his case, we find no error in the court’s rejection of this claim despite its incorrect recitation of the relevant law. Cf. *State v. Sepulveda*, 201 Ariz. 158, ¶ 9, 32 P.3d 1085, 1088 (App. 2001) (denying relief when “trial court correctly denied post-conviction relief . . . for the wrong reason”).

¶8 But even assuming Gay is correct that the court erred in doing so, he fails to address the court’s alternate basis for excluding the evidence—that its probative value was substantially outweighed by its prejudicial effect because it would improperly “allow [Gay] to focus on the victim’s prior sexual contacts without any connection to the events on [the] date in question.” *See* Ariz. R. Evid. 403. Accordingly, Gay has not shown the court erred in excluding that evidence and has not met his burden of demonstrating his appellate counsel was ineffective in failing to raise that claim. *See Strickland*, 466 U.S. at 687.

¶9 For the reasons stated, although we grant review of Gay’s petition, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge